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(4)
No. 07-373

FILED
DEC 4 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., CEH PROPERTIES, LTD., TIMOTHY S. HEERS, TERRIE HEERS THOMPSON, CHERYL D. NOLTE, GARY R. HEERS, AND CATHLEEN HEERS NORCOTT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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December 4, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF OF PETITIONER

Respondents' opposition is predicated on a persistent misstatement of the issue in this case. The issue is not whether federal law bars States "from recognizing property rights in the usable airspace *immediately above*" private land, Opp. at 13 (emphasis added); see also *id.* at 14, and requiring compensation when such airspace "is *appropriated* for public transit use," *id.* at 1 (emphasis added), see also *id.* at 11. The issue is whether a State can, consistent with federal law, grant ownership of *the first 500 feet* of navigable airspace above private land, and confer a *per se* right to compensation for height restrictions that do *not* "appropriate" property under the federal constitution because they allow economically beneficial use of the underlying land. This issue was not presented or addressed in *Sisolak* or *Jankovich*. Nor can federal law and regulations co-exist with this extraordinary state-law right to compensation, which undermines the careful balance Congress has struck between ensuring a safe and cost-effective national aviation system and protecting the rights of property owners near airports. The untoward effects that such state law interference will have on the national aviation system is more than sufficient to justify this Court's review. The "jurisdictional" issues respondents identify do not militate against review of this profoundly important issue.

1. The issue raised by this case is not, and indeed cannot be, "precisely the same" as that raised in *McCarran International Airport* v. *Sisolak*, No. 06-658 (filed Nov. 8, 2006) ("*Sisolak* Pet."). In *Sisolak*, the Nevada Supreme Court held that Ordinance 1221 caused a taking under *both* the federal and state constitutions. *McCarran Int'l Airport* v. *Sisolak*, 137 P.3d 1110, 1124 (Nev. 2006) ("We agree with Sisolak that, under the United States and Nevada Constitutions, the ordinances authorize the permanent physical invasion of his airspace."), *cert. denied*, 127 S. Ct. 1260 (2007). Accordingly, *Sisolak* did not raise the issue whether federal law preempts "a state constitutional right to compensation for

public use of navigable airspace *that causes no federally cognizable deprivation*" of property. Pet. at 18 (emphasis added).[1]

In *Sisolak*, moreover, the Nevada Supreme Court never addressed any question of preemption, let alone the issue posed where, as here, an ordinance is found to cause a taking under state, but not federal, law. In the decision below, by contrast, the Ninth Circuit resolved this very issue, ruling that federal law allows States to adopt more stringent takings restrictions than the Fifth Amendment imposes on airport zoning, and to require compensation for any regulation of the first 500 feet of navigable airspace. Pet. App. 18a-20a. Thus, the lower court did not merely "uphold the Nevada Supreme Court's interpretation of the Nevada State Constitution," Opp. at 11; it decided an important issue of federal preemption.

This Court could not have deemed this preemption claim "insubstantial," Opp. at 12-13, in *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965), because *Jankovich* involved an entirely different claim. The petitioners there argued that the Airport Act *mandated* airport zoning and thus preempted state-law nullification of such zoning power. See Br. for Ptrs. at 53-54, in *Jankovich* (filed Oct. 9, 1964) ("nullification of airport zoning" is "wholly incompatible with the federal scheme," which "is based on the *necessity* of recourse to airport zoning") (emphasis added), *available at* 1964 WL 81275. The Solicitor General disagreed with this different preemption argument, stating that federal law merely assumed the existence of local zoning authority, but neither mandated such authority nor overrode all state restrictions on it. Mem. for the United States as *Amicus Curiae* at 2 n.1, in *Jankovich* (filed Nov. 18, 1964) ("U.S. *Jankovich* Br.") (although the "Airport Act assumes that 'local power to zone

[1] Accordingly, petitioner raised the different issue of whether federal law "precludes recognition under state law of private ownership of federally defined navigable airspace." *Sisolak* Pet. at 12 (capitalization altered).

exists,' . . . . [t]here is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation").

The balance of the Solicitor General's brief, which respondents ignore, makes clear that the government did not believe federal law could co-exist with state laws that require compensation for height restrictions that cause no federal taking. The government stated that, "[b]ecause cost is a factor[,] . . . local authorities should be encouraged to restrict the use of land surrounding airports by appropriate zoning laws, which, of course, include height limitations." *Id.* at 3. Although "ownership of real property includes ownership of 'the immediate reaches of the superadjacent airspace,'" the government explained, "it does not follow. . . that this right is absolute and not subject to reasonable regulation." *Id.* at 8-9 (quoting *United States* v. *Causby*, 328 U.S. 256, 266 (1946)). To the contrary, reasonable airport zoning is constitutionally permissible, "*even though it deprives the neighboring landowner without compensation of some part of the ordinarily usable airspace above his property.*" *Id.* at 11 (emphasis added). This discussion makes no sense if, as respondents claim, the government thought States could recognize private rights in navigable airspace well beyond the "immediate reaches of the superadjacent airspace" and could compel payment for the same type of "reasonable airport zoning" the government deemed constitutionally permissible.[2]

Nor did this Court hold that federal law "in no manner limits" state constitutional protection of ownership rights in navigable airspace. Opp. at 14. The Court rejected the preemption argument in *Jankovich* because, contrary to the petitioners' claim in that case, the state decision did not signify "total nullification of airport zoning." 379 U.S. at 493

[2] The government's analysis in *Jankovich* is consistent with its most recent statements on the subject in *Breneman* v. *United States*. *See* Pet. at 29.

(opinion below "does not portend the wholesale invalidation of all airport zoning law"). The Court went on to state that "no substantial claim can be made that Congress intended to preclude such an application of state law *as is involved in the present case*." *Id.* at 494 (emphasis added). This is a case-specific ruling, and not, as respondents argue, a blanket rejection of all federal challenges to state constitutional protection of airspace rights. As petitioners have shown, Pet. at 24-25, the "application of state law . . . involved in" *Jankovich* resulted in recognition of a taking that would have been cognizable under federal law, because the 18-foot height limit prevented use of respondents' 30-foot high toll road. *Jankovich*, 379 U.S. at 488, 494; U.S. *Jankovich* Br. at 11 (landowner defended the judgment "only on the ground that, *as applied to its road*, the zoning ordinance effected an unconstitutional taking") (emphasis added). It is absurd to claim that the differences between the restriction in *Jankovich*, which denied *all* use of a toll road, and Ordinance 1221, which permits operation of a 315-room hotel-casino, "have no bearing," Opp. at 18, on *Jankovich*'s case-specific preemption analysis.

Respondents' claim that the Court considered the Aviation Act when conducting that analysis, *id.*, is equally baseless. The definition of "navigable airspace" was utterly irrelevant to the claim that federal law mandated local zoning, and the *Jankovich* petitioners thus did not cite that definition or the Aviation Act as the source of that mandate. See Br. for Ptrs. at 53, in *Jankovich* ("the federal scheme which the *Federal Airport Act* embodies is based on the *necessity* of . . . airport zoning") (emphases added).[3]

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[3] The petitioners cited the Aviation Act only once, 30 pages earlier, to show the authority of the Federal Aviation Administration ("FAA") to protect airport approach zones. Br. for Ptrs. at 24 n.14, in *Jankovich*. The Sponsor Assurance that the Court cited in *Jankovich*, 379 U.S. at 494, was derived from the Airport Act, not the Aviation Act. *See* Pub. L. No. 88-280, § 10, 78 Stat. 158 (1964) (codified as amended at 49 U.S.C. § 47107(a)(10)).

In short, *Jankovich* never addressed whether the Aviation Act and its implementing regulations preempt a *per se* state constitutional right to compensation whenever an ordinance regulates use of the first 500 feet of navigable airspace, even when the ordinance permits economically beneficial use of the underlying land and causes no federal taking. Indeed, if *Jankovich* did dismiss this preemption claim, it should be overruled, as such a state-law right plainly frustrates the purposes of these federal laws. See *infra*; see also Br. of Air Line Pilots Ass'n as *Amicus Curiae* in Support of Pet. ("ALPA Br.") at 10.

2. In their effort to show otherwise, respondents cite statutory and regulatory provisions that contemplate that airports will purchase airspace needed for safe flight, and permit use of federal funds for that purpose. Opp. at 19-22. But these provisions simply reflect Congress's recognition that the public's right of transit cannot trump the rights of landowners when overflights, or zoning restrictions designed to ensure their safety, cause a *federal* taking—a recognition courts would presume even without such express statutory language. See *Miller* v. *French*, 530 U.S. 327, 341 (2000). The fact that Congress understood that some land use restrictions would cause federal takings, and authorized use of federal funds to purchase property interests to avoid them, does not demonstrate that it intended to allow states to recognize *per se* rights to compensation for airport zoning restrictions that permit economically beneficial use of underlying land and cause no federal taking.

To the contrary, Congress and the Executive Branch have repeatedly recognized that airports cannot protect the public safety simply by purchasing property and airspace, because doing so is too expensive. "To purchase outright enough land to make the protection complete would often require that the acreage needed for the landing area proper be multiplied by five or more." Civil Aeronautics Administration, Airport Survey, H.R. Doc. No. 76-245, at 33 (1939). "The cost of

acquisition of sufficient land . . . is frequently beyond the capabilities of a single community." President's Airport Comm'n, *The Airport and its Neighbors* 8 (May 16, 1952). Thus, when Congress amended the Airport Act to require assurance that "appropriate action, including the adoption of zoning laws," is taken, "to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport," Pub. L. No. 88-280, § 10, 78 Stat. 158 (codified as amended at 49 U.S.C. § 47107(a)(10)), it plainly intended zoning laws to be used instead of such prohibitive acquisitions. Indeed, the Senate Committee explained that it "has no intention of allowing airports to be priced out of existence." S. Rep. No. 88-446, at 24 (1963).

Yet that is what will happen under the Ninth Circuit's ruling. Petitioner conservatively estimates that its liabilities under *Sisolak*'s *per se* standard could total $10 *billion*.[4] There are over 3,554 acres within a 20,000-foot radius of the airport that are subject to height limits, see ALPA Br. at 7, and the judgments here and in *Sisolak* were in the millions of dollars. If only a modest percentage of the numerous nearby landowners bring *Sisolak* claims, petitioner's liabilities will quickly reach crushing levels.[5] Nor can respondents dispute the harmful effects that such massive liabilities, or the service

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[4] This estimate is not in the record, Opp. at 23, because, when the case was tried, the Nevada Supreme Court had *rejected* the very type of takings claim at issue here. *See County of Clark* v. *Hsu*, No. 38853, 2004 WL 5046209 (Nev. Sept. 30, 2004) (unpublished). *Sisolak* was not announced until this case was on appeal, and the record was closed.

[5] Petitioner never proposed to spend funds from passenger facility charges to buy respondents' airspace, as respondents misleadingly claim, Opp. at 5, 23. Rather, petitioner proposed to spend $60 million to buy two parcels of land within the runway protection zone ("RPZ"). Only 1.25 acres of respondents' land fell within the RPZ. Petitioner did not purchase this land because it could be used in various ways (*e.g.*, as a parking lot) that are compatible with zoning for the RPZ, and both courts concluded there was no taking of this property. Pet. App. 23a-24a. Nor did petitioner purchase the other property within the RPZ; it was developed as a golf course, which is also compatible with zoning for the RPZ.

reductions necessary to avoid them, will have on the national aviation system as a whole. See Pet. at 19-22; ALPA Br. at 20 (describing ripple effects on "airport operators in neighboring States"). Thus, petitioner is not positing the type of groundless "doomsday scenario" predicted in *Jankovich*, Opp. at 23, where the petitioners mistakenly believed that the state court had declared all airport zoning void. The potential liabilities created by *Sisolak*'s *per se* standard are very real, as are the magnitude of the harms they threaten to McCarran and the larger aviation system as a whole.

Sisolak's *per se* takings standard therefore plainly frustrates the Aviation Act's goals of ensuring economical and safe air transportation. To achieve these goals, federal law places hundreds of feet of navigable airspace needed for safe takeoff and landing in the public domain, Pet. at 6, 16, requires local governments to eliminate flight hazards around airports, and encourages them to do so using zoning restrictions because of their cost advantages. See U.S. *Jankovich* Br. at 3. Yet *Sisolak* recognizes private ownership of this same airspace and compels Nevada airports to pay massive *per se* takings liabilities for using the types of zoning restrictions Congress encourages, when those restrictions do not deprive affected land of economically beneficial use. Thus, Nevada airports are forced to do something that "other airports do not already do," Opp. at 23—they must purchase the public's right to use airspace that is not privately owned within the meaning of the federal takings clause, and that Congress has already permitted the public to use.[6]

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[6] The extraordinary nature of this requirement is confirmed by various federal and state cases that have rejected claims of private ownership of the navigable airspace, or use of state law impediments to its use. *See* Pet. at 26-29. Respondents offer various factual distinctions, Opp. at 14-17, that simply confirm what petitioner itself acknowledged—these cases do not conflict "squarely" with the decision below. These distinctions, however, cannot obscure the fundamental point: Nevada's *per se* takings standard is inconsistent with the principle that "[p]rivate property interests simply do not, as a general matter, exist in the navigable airspace," *Air*

Ultimately, respondents claim that the best evidence that Congress meant to allow States to create such interference with safe and efficient air travel is an FAA circular, which states that "'height limitations . . . should not be so low at any point as to constitute a taking of property without compensation *under local law*.'" *Id.* at 20 (emphasis in original) (quoting Advisory Circular No. 150/5190-4A, *A Model Zoning Ordinance to Limit Heights of Objects Around Airports* (1987)). But the phrase "local law" is plausibly read to refer to local zoning laws that *cause* a taking, not to state constitutions that determine when a taking occurs. Indeed, it is odd to call state constitutions "local law," and unlikely that the FAA was concerned only with state, not federal, takings. In all events, the FAA could not have been referring in 1987 to the type of unprecedented state takings recognized in *Sisolak*, where any restriction below *500 feet* is considered "so low" as to cause a taking. In short, this one sentence in non-binding guidance cannot show that Congress intended to allow States to impose *per se* takings liabilities for use of the very zoning restrictions it has long encouraged local governments to use—*i.e.*, height restrictions that permit economically beneficial use of underlying land and thus cause no federal taking. If the Court has "[a]ny conceivable doubt," *id.*, as to the preemptive force of the Aviation Act and its implementing regulations, it should call for the views of the United States, rather than rely on respondents' self-serving views.

3. In a final desperate effort to prevent review, respondents assert that this case is a poor vehicle because petitioner made a number of preliminary challenges below. The two courts below considered and decided these questions, with both courts concluding that there are no jurisdictional or other barriers to entertaining the merits of respondents'

Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1219 (Fed. Cir. 2005), except where use of such airspace is necessary to ensure that the underlying land can be put to some economically beneficial use.

takings claim in federal court. These routine issues impose no obstacle for this Court to reach the critical question of federal preemption presented by this petition.

Two of the issues respondents describe equivocally, *id.* at 29 n.6, as "jurisdictional" plainly are not. Namely, respondents contend that federal subject matter jurisdiction is in doubt on two fronts because one of the judges who heard the case below sat both as the bankruptcy judge and then as the district court judge. *Id.* at 27-29. However, "[s]ubject matter jurisdiction is the legal authority of a *court* to hear and decide a particular type of case." Erwin Chemerinsky, *Federal Jurisdiction* § 5.1, at 259 (4th ed. 2003) (emphasis added). Thus, this one *judge's* actions—unique as they were—could not divest the bankruptcy and district *court* of "legal authority" to hear this case. At most, his conduct implicated the non-jurisdictional question whether it was appropriate for one judge to have considered the case in both forums. Petitioner, however, does not press this argument here so it is waived. See *Sosna* v. *Iowa*, 419 U.S. 393, 398 (1975) (parties may waive non-jurisdictional defects).

Nor will the remaining issues hinder this Court's review. First, petitioner relied on Ninth Circuit law to argue that the *Rooker-Feldman* doctrine protects non-final state rulings from collateral federal attack, but the court below rejected this reading of its caselaw. Pet. App. 10a. As nothing in this Court's jurisprudence is to the contrary, see *Verizon Md., Inc.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 644 n.3 (2002) (*Rooker-Feldman* "merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments"), the issue is not presented by petitioner and has no remaining relevance.

Second, in challenging the ripeness of the takings claims, petitioner argued that respondents had failed to exhaust their state inverse condemnation remedy before they removed their claims to bankruptcy court. The Ninth Circuit *agreed* that

respondents were obligated to exhaust these remedies; it held, however, that respondents had not abandoned their state inverse condemnation claims and instead had simply continued adjudicating them in a new forum, *i.e.*, bankruptcy court. Pet. App. 14a. Petitioner does not dispute this disposition of its ripeness challenge, and that disposition raises no impediment to this Court's review of the preemption issue raised by this case.

Finally, petitioner challenged the bankruptcy court's conclusion that respondents' takings claims were "related to" the bankruptcy proceedings within the meaning of 28 U.S.C. § 1334(b) because they could "conceivably" affect the bankruptcy estate; petitioner argued that the proper "effect" test was whether the claims would affect implementation of the plan of reorganization. Applying *Celotex Corp.* v. *Edwards*, 514 U.S. 300 (1995), the Ninth Circuit ruled that the "effect" test applied only to suits between third parties; causes of action owned by the debtor—such as respondents' takings claims—necessarily satisfy the "related to" requirement. Pet. App. 11a. As petitioner did not challenge "related to" jurisdiction under this separate "related to" prong, the Ninth Circuit's straightforward application of that prong raises no hurdle to review.

At bottom, respondents' game of jurisdictional "gotcha" provides no basis for denying review of the pressing issue of federal preemption presented by this case. In fact, as *amici* have stressed, this case is an ideal vehicle, because it presents the issue in unusually stark terms, given the Ninth Circuit's finding that there was no federal taking. ALPA Br. at 7-8.[7]

CONCLUSION

For all the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

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[7] In light of that finding, respondents' suggestion that there was a federal taking, Opp. at 29-30, is baseless.

Respectfully submitted,

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